

IN THE MATTER OF THE ARBITRATION BETWEEN

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)	
SOUTH WASHINGTON SCHOOLS)	BMS NO. 06-PA-1251
INDEPENDENT SCHOOL DISTRICT NO.)	
833 COTTAGE GROVE, MINNESOTA)	
)	
“EMPLOYER”)	
)	
And)	DECISION AND AWARD
)	
ASOCIATION OF SCHOOL BUS DRIVERS)	RICHARD R. ANDERSON
INDEPENDENT SCHOOL DISTRICT NO.)	ARBITRATOR
833)	
)	
“UNION”)	NOVEMBER 3, 2006
)	
)	

APPEARANCES

Employer

Mark T. Porter, Attorney
Keith Paulson, Transportation Director

Union

Roger A. Jensen, Attorney
Linda Kritzky, Union President
Mike Miller, Union Vice-President

JURISDICTION

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on September 26, 2006¹ at the Bureau of Mediation Services' (BMS) facilities in St. Paul, Minnesota. Both parties were afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on September 26th. Post-Hearing Briefs were simultaneously mailed on October 20th, which were received from the Employer on October 21st and from the Union on October 24th. This matter was then taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that is effective from July 1, 2003 through June 30, 2005². The language in Article XV [GRIEVANCE PROCEDURE] provides for the filing, processing and arbitration of a grievance. Section 6 of this Article defines the jurisdiction of the Arbitrator. The parties stipulated that the grievance is properly before the undersigned Arbitrator for final and binding decision. The parties further stipulated that there are no procedural arbitrability issues.

BACKGROUND

The Employer is an independent public school district with its District Office located in Cottage Grove, Minnesota. The Union represents a unit of approximately 170 school bus drivers and assistants. The bargaining unit is set forth in Article III [Recognition of Exclusive Representative]. The parties have a history of collective bargaining dating back over 30 years.

¹ Unless otherwise indicated herein, all dates are in the year 2006.

² Joint Exhibit No. 1.

On February 15th, the Employer through Transportation Director Keith Paulson notified bargaining unit employees via an internal newsletter that, "*I will be reducing the caps on the number of drivers and assistants who request time off beginning April 17th*".³ This action amounted to a unilateral "blackout" of employees taking unpaid vacation absences. Thereafter, the Union filed a grievance on February 19th alleging that the Employer violated Section 2 [Vacation Absences] of the Agreement by this action.⁴ The grievance was expanded on April 17th to include the Employer's announced "blackout" of vacation absences during the first month (September) of the upcoming 2006 school year.⁵ Thereafter, the parties were unable to resolve the grievance through the grievance procedure prompting the Union to file for arbitration with BMS. The undersigned was notified of being selected as the neutral Arbitrator by letter from the Union's attorney dated July 28th.

THE ISSUE

The parties stipulated that the issue is, "Whether the Employer violated the collective bargaining agreement when it imposed a blackout vacation period for all bus drivers and assistants beginning on April 17, 2006".

RELEVANT CONTRACT PROVISIONS

ARTICLE IV SCHOOL BOARD RIGHTS

Section 1. Inherent Managerial Rights: The Association recognizes the School Board is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the School Board, its overall budget, utilization of technology, the organizational structure, and the selection and direction and number of personnel.

³ Joint Exhibit No. 3.

⁴ Joint Exhibit no. 5.

⁵ Joint Exhibit No. 7(a).

Section 2. Management Responsibilities: The Association recognizes the right and obligation of the School Board to efficiently manage and conduct the operation of the school district within its legal limitations and with its primary obligation to provide educational opportunity for the students of the school district.

Section 3. Effect of Laws, Rules and Regulations: The Association recognizes that all employees covered by this Contract shall perform the services and duties prescribed by the School Board rules, regulations, directives and orders, issued by properly designated officials of the School Board. The Association also recognizes the right, obligation and duty of the School Board and its duly designated officials to promulgate rules, regulations, directives and orders from time to time as deemed necessary by the School Board insofar as such rules, regulations, directives and orders are not inconsistent with the terms of this Contract. All provisions of this Contract are subject to federal and state laws.

Section 4. Reservation of Managerial Rights: The foregoing enumeration of School Board rights and duties shall not be deemed to exclude other inherent management rights and management functions not expressly reserved herein. All management rights and management functions not expressly delegated in this Contract are reserved to the School Board.

ARTICLE XII LEAVES OF ABSENCE

Section 2. Vacation Absences: The Director may approve requests to be absent without pay during the school year in the event a driver's primary job, or a driver's spouse's job requires a vacation to be taken during the school year. Any two (2) employees who submit requests for vacation at the same time will be evaluated together. No more than five drivers and two assistants may be on vacation absences at one time.

ARTICLE XV GRIEVANCE PROCEDURE

Section 6. Arbitration:

Subd. 4. Jurisdiction: The arbitrator shall have jurisdiction over disputes properly brought before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend, subtract from, or modify the terms of this Agreement.

Subd. 5. Decision: A written decision by the arbitrator shall be rendered within 30 calendar days after the close of the hearing. Decisions by the arbitrator in cases properly before the arbitrator shall be final and binding upon the driver, the Association and the School Board, subject, however, to the limitations of arbitration decisions as provided in the P.E.L.R.A.

Section 7. Exclusive Remedy: The procedure established by this Article shall be the sole and exclusive means to resolve grievances as defined by Section 1 of this Article.

FACTS

The current Agreement expired on June 30, 2005. The parties have an extension agreement continuing the expired Agreement until a new Agreement is reached. The parties have negotiated this new Agreement that will be effective July 1, 2005 through June 30, 2007, however, this Agreement has not yet been formally executed as of the date of the hearing.⁶ There are provisions in both Agreements that govern paid and unpaid leaves or absences. Article XII Section 2 specifically governs unpaid vacation absences.⁷ It states:

"The Director may approve requests to be absent without pay during the school year ~~in the event a driver's primary job, or a driver's spouse's job requires a vacation to be taken during the school year.~~ Any two (2) employees who submit requests for vacation at the same time will be evaluated together. No more than five drivers and two assistants may be on vacation **or business leave** absence at one time."⁸

During negotiations for the 2005-2007 Agreement, the Union proposed changing the language in the first sentence of Section 2 to read, "The Director *shall not unreasonably withhold approval of requests to be absent without pay during the school year.*" in addition to the above agreed to stricken language.

As stated earlier, employees were notified through a periodic newsletter published on February 15th by Director Paulson that he was "*reducing the caps on the number of*

⁶ Joint Exhibit No. 2.

⁷ Hereinafter, all reference to Section 2 will be Article XII unless otherwise indicated.

⁸ The lined out language and the added bold language is language that the parties tentatively agreed to include or exclude in the 2005-2007 Agreement.

*drivers and assistants who request time off beginning on April 17th.*⁹ Paulson testified that the reason for having a blackout during the first three weeks of the school year was that there was an initial uncertainty and the timing of bus routes until the bus drivers gained more experience. There were also additional field trips and expanded athletic events that required bus transportation during this period. The blackout in the Spring of 2006 was necessary because several bus drivers had indicated their intent to resign coupled with extra demands placed on bus drivers because of traditional Spring field trips and other extra-curricular activities.

Initially, the Union was informed that the number of employees allowed to be on unpaid vacation absence would be limited to two bus drivers and one assistant; however, by April 17th it appears a total blackout existed. This unilateral action resulted in employees being prohibited from taking unpaid vacation absences during this blackout period that lasted until the end of the school year in early June.

The School Board on July 1, 2005 established in its Transportation Department Policy Manual a bus driver and assistant vacation blackout period during the first three weeks of the school year.¹⁰ This beginning school year (first three weeks of September) blackout period has been in effect since approximately the year 2000. This unilaterally imposed blackout period was never been challenged by the Union in the grievance procedure prior to the instant grievance.

The Union has been under new leadership for approximately the last 18 months prior to the date of the hearing. Operating Engineers Local No. 70 represents the

⁹ Joint Exhibit No. 3.

¹⁰ Joint Exhibit No. 4. The policy states, "*Vacation blackout times are the first three weeks of school year.*" It appears that this policy has been included in previous Transportation Department Policy Manuals.

Employer's custodial employees. These parties have a collective bargaining agreement with a specific provision covering vacation blackouts. Article XIV Section 3., Sud.4. of this agreement states:

"Vacations shall not be granted during the week (Monday-Friday) that the school year ends. Vacation shall not be granted the week school starts and the one (1) preceding weeks (except in emergency). The school district reserves the right to limit the number of employees taking vacation during the time school is in session to assure the school's needs can be met."

POSITION OF THE UNION

It is the position of the Union that the Employer violated the provisions of Section 2 of the Agreement when it unilaterally imposed a more restrictive cap in the form of a blackout than was mandated by the language in the Section 2 provision. The Union argues that the language in the Section 2 provision is clear and unambiguous. The provision clearly states "*No more than five drivers and two assistants may be on vacation absence at one time.*" Except for the term "*or business leave*", the language is identical in the unexecuted 2005-2007 Agreement. It is clear from the provision that the parties have negotiated a cap on the number of employees who could be on vacation at any one time. Management is then not free to unilaterally impose a more restrictive cap even if it believes it has good reason to do so.

The Union also argues that the broad management rights clause in Article IV does not privilege the Employer to engage in this blackout action. Under the management rights provision the Employer has the authority "*to promulgate rules, regulations, directives and orders from time to time as deemed necessary by the School Board*"; but only "*insofar as such rules, regulations, directives and orders are not inconsistent with the terms of this Contract*". The Employer is free to formulate rules, regulations policies, etc. including the

blackout provision in the Transportation Department Policy in Joint Exhibit No. 4 that states, "*vacation blackout times are the first weeks of the school year*". This policy, however, is not applicable to bus drivers and assistants since it is inconsistent with terms of Section 2; and, therefore not privileged under the broad management rights clause of the Agreement. It is also immaterial that the Union may have been given the opportunity to read the rules. It is clear from the testimony of Director Paulson that the Union never agreed to nor negotiated those rules nor were the rules ratified by members of the bargaining unit, matters that are a prerequisite to contract modification.

The Union also argues that the authority of the arbitrator would be exceeded if an arbitrator ignored the clear and unambiguous language in Section 2. Article XV Section 6, Subd. 4 of the Agreement sets forth the arbitrator's authority wherein it states, "*The jurisdiction of the arbitrator shall not extend, subtract from, or modify the terms of this Agreement.*" Since the Agreement clearly sets forth what the caps are, the arbitrator's authority would be exceeded if the Employer were allowed to impose lesser caps.

The Union further argues that the word "may" in the first sentence of Section 2 does not give the Employer discretion to reduce the cap or impose a blackout. The fact that the Director may approve vacation leave is a completely different thought and circumstance from the limitation of five drivers and two assistants taking vacation absences at any one time. In fact, if it was within the Director's discretion to impose any vacation caps he deems appropriate it would not be necessary for the provision to contain language in the last sentence of Section 2 limiting the number of bus drivers and assistants that may be on vacation absence at any one time.

The Union also argues that its proposal during 2005-2007 contract negotiations (Employer Exhibit No.1) to modify the first sentence of Section 2 to read, "The Director *shall not unreasonably withhold approval of requests to be absent without pay during the school year.*" does not give the Employer authority to unilaterally impose caps or a blackout. The proposal does not deal with caps or blackouts; rather it deals with the right of the Employer to deny vacation absence requests from individual employees.

Finally, the Union argues that the Employer is well aware of the type of language it needs in a collective bargaining agreement to have broad authority to impose caps on vacation absences. The Employer has negotiated a provision (Article XIV Section 3, Subd. 4) in its contract with Operating Engineers Local No. 70 that gives it authority to set caps and/or impose a vacation blackout. Thus, it is clear that the Employer is seeking broad authority in arbitration without negotiating this broad discretion with the Union.

POSITION OF THE EMPLOYER

It is the Employer's position that the Employer did not violate the Agreement when it made a reasoned decision based on service demands and employee availability to implement restrictions on approved vacation requests. The Employer argues that the clear and unambiguous language of Section 2 supports the Employer's discretion in approving vacation requests. The phrase in the first sentence of Section 2 "*may approve*" clearly connotes choice as to the Director's alternatives to grant or deny vacation requests. To interpret the term "may approve" as a term of non-discretion is absolutely contrary to the clear meaning and intent of the phrase. It has also been a long-standing practice of the Employer during the month of September, where due to volatility in

determining routes, scheduling and timing of the routes and expanded extra-curricular activities, vacation requests were not approved.

The limitation on vacation requests during September is communicated every year to bus drivers and assistants in the Transportation Department Manual (Joint Exhibit No. 4) wherein it states, "*Vacation blackout times are the first 3 weeks of the school year*". This policy was never grieved until it was "bootstrapped" to the current grievance.

The Employer further argues that its broad discretion in approving vacation requests was the clearly negotiated intent of the parties at the time of the Agreement. While Section 2 has been the topic of discussion in several contract negotiations, the language giving the Director discretion through the phrase "may approve" has remained unchanged and the original discretionary intent has remained unchanged. During the last contract negotiations the Union proposed language that would have modified the Director's discretion in approving vacation requests. Specifically the Union requested that the first sentence in Section 2 be changed to read, "The Director shall not unreasonably withhold approval of requests to be absent without pay during the school year." It was clear from this proposal that the Union was attempting to narrow the broad discretion of the Employer in granting vacation requests.

The Employer further argues that to interpret the limitation of five bus drivers and two assistants as a minimum threshold is to render the Section 2 discretionary language "may approve" inoperative. Such a result is absurd or nonsensical and should be rejected. The logical interpretation of this provision gives Employer discretion as to the granting of vacation absences and therefore the right to impose, when necessary, limitations or caps on vacation approvals. Finally, there was no evidence presented at the hearing that any

employee was harmed by the February 15th timely decision of the Employer to limit vacation requests beginning April 17th.

OPINION

This issue in this matter involves the contract interpretation of Section 2 as to whether the Employer had the right to impose caps or a blackout of unpaid vacation requests in the Spring and Fall of 2006. Both parties argue that the language in the aforementioned provision is clear and unambiguous, however, they arrive at different interpretations. The Employer argues that it has discretion in approving unpaid vacation requests; and, therefore, can impose caps or limitations on the number of employees seeking unpaid vacation leave. The Union argues that while the Employer may have discretion in approving vacation requests for individual employees, it is mandated by the provision to allow a minimum of five bus drivers and two assistants to be on unpaid vacation leave at any one time.

I agree with the parties that the language in Section 2 is clear and unambiguous. It is clear from the wording "*may approve*" in the first sentence of this provision that the Employer has discretion in approving vacation requests. It is also clear in the language of the last sentence in the provision wherein it states, "*No more than five drivers and two assistants may be on vacation absence at one time.*" the parties have negotiated caps or limitations on the number of bus drivers and assistants that can be on unpaid vacation leave at any one time. The term "may approve" clearly applies to individual leave requests. It does not give the Employer carte blanche to ignore the established caps or limitations contained in the last sentence of the provision. As the Union points out, if it was within the Director's discretion to impose any vacation caps or any blackout period he

deemed appropriate, it would not be necessary for the provision to contain language in the last sentence of Section 2 limiting the number of bus drivers and assistants that may be on unpaid vacation absence at any one time. If the Employer wanted the discretion to establish caps or blackout periods, it could have proposed and negotiated this authority into Section 2, much the same as it did in its contract with Operating Engineers Local No. 70.

Further, the Employer's reliance on a provision in its Transportation Department Policy Manual establishing a blackout policy during the first three weeks of the school year has no merit. While the Union may have read the vacation blackout policy in the Manual, the evidence clearly shows that it was adopted unilaterally by the Employer and never was the subject of collective bargaining nor formally adopted by the Union. While the Employer may have the inherent managerial right under the Agreement to unilaterally *"promulgate rules, regulations, directives and orders from time to time as deemed necessary by the School Board"*. This inherent managerial right inures to the Employer only *"insofar as such rules, regulations, directives and orders are not inconsistent with the terms of this Contract."* Clearly, the establishing of a September or any other unilateral cap blackout period is in direct conflict with Section 2. If the Employer wanted the authority to unilaterally implement cap blackouts it could have, as stated earlier, proposed and negotiated this authority into Section 2, much the same as it did in its contract with Operating Engineers Local No. 70.

Finally, the Employer's reliance on its past practice argument for authority to unilaterally implement cap blackout periods and the fact that the Union attempted to restrict the authority of the Director in denying vacation requests during the recent

contract negotiations also has no merit. The language in Section 2 is void of any mention of blackout periods and specifically states clear and unambiguous limits or caps of the number of employees who may be on vacation leave at any one time. Since the language is clear and unambiguous, there is no basis under contract law to examine extrinsic evidence regarding past practice, the parties intent or other parole evidence. This is true even if the results are harsh or contrary to the expectations of one of the parties.¹¹

It appears that the Employer may have had good reason to unilaterally implement unpaid vacation absence caps and/or blackouts in both the Spring and Fall of 2006. However, inasmuch as Section 2 sets specific caps or limitations on unpaid vacation absences, it should have sought the agreement of the Union or negotiated language giving it the authority before implementing said changes in the caps. Finally, It is not known if any employee was specifically denied unpaid vacation leave in the Spring or Fall of 2006 that directly resulted in him/her having to use paid vacation or having otherwise suffered economic harm.¹² If such employees exist they are entitled to have paid vacation leave restored that was used in lieu of any denied unpaid vacation leave.

¹¹ Elkouri & Elkouri, How Arbitration Works, 5th Ed. Pgs. 482-485. (1997)

¹² By the term specifically, I am referring to any employee who formally requested unpaid vacation leave during the relevant periods herein.

AWARD

For the reasons set forth in this Decision, the grievance of the Union is sustained in its entirety. As a remedy:

IT IS HEREBY ORDERED that the Employer cease and desist from unilaterally imposing any vacation caps or limits on the number of school bus drivers or assistants that may be absent at any one time other than contained in Article XII Section 2 of the Agreement.

IT IS FURTHER ORDERED that any employee who was specifically denied unpaid vacation leave in the Spring or Fall of 2006 resulting in him/her being compelled to use paid vacation leave be made whole.

The undersigned assumes and appreciates the willingness of the parties to cooperate in effectuating the above determination. The undersigned, however, will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award in order to resolve any matter relative to implementation.

Dated: November 3, 2006

In Eagan, Minnesota

Richard R. Anderson, Arbitrator